BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
Chairman
JAMES M. IRVIN
Commissioner
WILLIAM A. MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner

IN THE MATTER OF US WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996

Docket No. T-00000A-97-~~238~~ -0238

QWEST'S COMMENTS ON STAFF'S RECOMMENDED OPINION AND ORDER ON THE MAY 1, 2002, FINAL REPORT ON TRACK A AND PUBLIC INTEREST AND THE AUGUST 19, 2003 SUPPLEMENTAL REPORT

INTRODUCTION

Qwest Corporation ("Qwest") respectfully submits these comments on Staff's Recommended Opinion and Order on the May 1, 2002, Final Report on Track A and Public Interest and the August 19, 2003 Supplemental Report ("Staff's Recommended Opinion and Order").[1]

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[1] Staff's Recommended Opinion and Order on the May 1, 2002, Final Report on Track A and Public Interest and the August 19, 2003 Supplemental Report, *In the Matter of U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996,* Arizona Corporation Comm'n, Docket No. TA-00000A-97-0238 (August 19, 2003) ("Staff's Recommended Opinion and Order").

The Staff's Recommended Opinion and Order correctly concludes that "Section 271 relief for Qwest is appropriate, as it relates to the Public Interest."[2] However, it does recommend that Qwest refile its Winback Tariff specifying that Qwest will not attempt to utilize that tariff to win back a lost customer until a minimum of ninety (90) days from the date the customer left Qwest for another service provider.[3] Although Qwest agrees with virtually all of Staff's Recommended Opinion and Order, it takes exception to this Staff recommendation on Qwest's Winback Tariff. In its order approving BellSouth's section 271 applications for Georgia and Louisiana, the Federal Communications Commission ("FCC") made clear that winback programs are appropriate under the FCC's rules, and do not present a concern under section 271's public interest standard. Qwest therefore seeks modification of the Staff's Recommended Opinion and Order on this narrow but important issue and asks the Commission to reject the Staff's recommended modification to Qwest's Winback Tariff.

DISCUSSION

There is no legal support provided for Staff's position that Qwest's Winback Tariff be modified. There is no attempt to distinguish or explain why Staff's request to modify Qwest's Winback Tariff as a condition of public interest approval in this Section 271 docket is not at odds with the FCC's 271 Order addressing this point. There is no justifiable rationale provided in Staff's Recommended Opinion and Order to support the disparate treatment for Qwest. All proposals designed to prevent Qwest from pursuing winback efforts pursuant to its lawful and Commission-approved tariff while allowing other entities to pursue their own winback programs is discriminatory and unfair. The local market in Arizona is open and robust competition is

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[2] Staff's Recommended Opinion and Order at p. 34.

[3] Staff's Recommended Opinion and Order at ¶¶ 102-103.

actually occurring today. It is inequitable to hinder Qwest from pursuing lawful tariffed winback efforts while all other providers can engage in winback efforts in this open market unfettered by Commission restrictions.

There is no evidence in this record that Qwest has abused its Winback program or violated the terms of its Commission-approved Winback Tariff. Staff does not even suggest in its Recommended Opinion and Order that Qwest has somehow abused the Winback program in any way or made improper use of confidential information to stall or prevent customers from switching to CLECs in the first place; rather, the Staff's stated concern is that for the first months after a customer switches to a CLEC, CLECs may need additional protections from competition from Qwest.[4]

The FCC has now addressed the issue of whether the existence of Winback Tariffs for a BOC that will receive section 271 relief is an issue to be addressed in the context of the section 271 docket. In the *BellSouth Georgia/Louisiana Order*, the FCC confirmed that winback programs are not inherently anticompetitive and therefore do not run afoul of the public interest standard of section 271. Specifically addressing and rejecting the winback issue raised by Staff in this proceeding, the FCC rejected commenters' allegations that BellSouth's Section 271 application was not in the public interest because of winback marketing pursuant to its winback tariff.[5] In the *BellSouth Georgia/Louisiana Order,* the FCC noted that its rules and orders have long drawn a distinction between "retention programs," where a carrier uses the knowledge it gains from the switching process of a customer's impending switch to another carrier to dissuade

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4 *Id.* at ¶¶ 100-101.

5 *See* Memorandum Opinion and Order, *In the Matter of Joint Application by BellSouth Corporation, BellSouth Communications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35, FCC 02-147, at ¶ 301 (May 15, 2002) ("BellSouth Georgia/Louisiana Order").

the customer from ever leaving, and permissible "winback programs," where the carrier is simply marketing to a customer who has already left.[6] Qwest's Winback program does not present even the potential for misuse of proprietary carrier-to-carrier information under 47 U.S.C. § 222(b).[7] In the *BellSouth Georgia/Louisiana* Order the FCC makes clear that in the absence of any formal FCC complaint that a BOC has violated section 222(b) (and Staff does not suggest that any such complaint exists here), winback programs are legitimate and not inconsistent with Section 271's public interest standard.[8] Additionally, there are neither facts nor allegations in the record that suggest that Qwest has somehow abused the Winback program in any way or made improper use of confidential information to stall or prevent customers from switching to CLECs in the first place.

Moreover, the *BellSouth Georgia/Louisiana Order* makes clear that if there are any allegations of improprieties concerning a BOC's particular implementation of a winback program, the section 271 docket is not the proper place to raise them; rather, they are more appropriately considered in separate state intercarrier complaint proceedings.[9] Additionally, in discussing the concept of disputes over tariff issues, the FCC determined that "[p]ursuant to

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6 *Id.* (citing *Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* CC Docket No. 96-115; *Implementation of the Non-Accounting Safeguards Section of 271 and 272 of the Communications Act of 1934, as Amended,* CC Docket, No. 96-149, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, ¶¶ 7, 65, 77 (1999)).

7 *Id.* at ¶ 302. Qwest's Winback program makes no use of proprietary carrier-to-carrier information. Qwest's Winback program works as follows: When a customer contacts Qwest to disconnect service, Qwest's Retail organization asks its customer why he or she is electing to disconnect, and if the customer provides a response, that response is tracked. Among the reasons provided by customers is that the customer is opting to shift to the service of a CLEC. Qwest maintains a tracking database of disconnect reasons and is able to sort that database to pull a report of those customers who have left Qwest for a competitor. (No information regarding the CLEC to which the customer has opted to migrate is retained in Qwest's Retail systems, nor is that information available though any other means.) That list is subsequently used as a basis for a follow-up contact with the customer to offer an incentive if the customer would consider returning to Qwest.

8 *Id.* at ¶¶ 302-303.

9 *Id.*

section 271, a BOC must demonstrate that its local market is open to competition."[10] The FCC determined that "[c]oncerns such as this one, which relate to the reasonableness of [the BOC's] . tariffs, are beyond the scope of a section 271 proceeding."[11] Therefore, disputes over tariffed services, such as winback, should be addressed in separate proceedings from the 271 docket. Additionally, the FCC noted the "specialized nature of the section 271 process"[12] and Qwest believes that "these issues would be more appropriately resolved in a different proceeding."[13]

Qwest notes that this Commission had already considered Qwest's Winback tariffs multiple times in separate tariff proceedings, and it has refused to find those tariffs to be anticompetitive and always approved them. For instance, in 1999, AT&T objected to Qwest's Winback program for reasons that echo Staff's concerns here: "the establishment of . . . [a Winback] program in local exchange markets will necessarily delay or thwart the development of competition."[14] The Commission approved the tariff in spite of AT&T's argument.[15] Given that the Commission has already considered these concerns, there is no reason to re-litigate them now as part of the public interest inquiry in this section 271 docket. Particularly in light of the specific FCC guidance that these tariffed winback issues are not appropriately considered in a

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10 *Id.* at ¶ 305.

11 *Id.*

12 *Id.* at ¶ 208.

13 *Id.* (determining that an interconnection issue addressed therein should be addressed in a different proceeding).

14 Letter from AT&T to Chairman Irvin, *Re: U S WEST Competitive Response Program, Docket No. T-0151B-99-0061*, at 3 (Mar. 8, 1999).

15 Order, *In the Matter of the Tariff Filing of U S WEST Communications, Inc., Tariff Pages Filed Regarding the New Competitive Response Program,* Docket No. T-01051B-99-0061 (Mar. 15, 1999). The Staff recommended approval of the tariff at that time. *Id.* at ¶ 11.

section 271 docket and are not appropriately a condition of section 271 approval. This docket is concerned with applying the FCC's section 271 public interest standard. There are neither facts nor allegations in the record that Qwest's Winback program is violating its lawful Commission-approved tariff or that Qwest is somehow abusing its Winback program in the manner in which it implements the tariffed program. There is also no evidence that AT&T's 1999 dire prediction that Qwest's Winback tariffs would thwart competition in Arizona has come true. In fact, the evidence in the 271 proceeding has proven that competition in Arizona is robust and programs such as Qwest's Winback program have not hurt competition, but have brought the benefit of competition to Arizona consumers. In fact, the Declaration of David L. Teitzel filed on September 4, 2003 in the Arizona 271 proceeding at the FCC shows that CLECs have captured 20.6 percent of access lines in Arizona based on the E-911 estimation method that Qwest, BellSouth, SBC and Verizon have all used in FCC 271 proceedings.[16]

The Commission's refusal to find Qwest's Winback Tariff to be anticompetitive is exactly right. Far from being "anticompetitive," the Winback program is nothing more than recognition that competition exists in Qwest's marketplace. The FCC echoes this conclusion in its *BellSouth Georgia/Louisiana Order*, as discussed above. This incentive program may be invoked only *after* Qwest has lost a customer to a CLEC. This program is not, and cannot, be used to discourage a Qwest customer from electing to migrate to a competitor.

Only after a customer has left Qwest and obtained service from a CLEC will the winback incentives come into play. Cox, the primary complainant regarding Qwest's program, does exactly the same thing. In the section 271 Public Interest workshop in Arizona, the witness for

[16] Declaration of David L. Teitzel – State of Local Exchange Competition, Track A and Public Interest Requirements, *In the Matter of Qwest Communications International Inc.'s Application for Authority to Provide In-region, InterLATA Services in Arizona,* CC Docket No. 03-194, at ¶39 (September 4, 2003).

Cox confirmed: 1) that Cox has a competitive response tariff designed to win back customers who have left Cox for some other provider, and 2) that the Cox tariff is similar to the Qwest tariff at issue here.[17] Barring Qwest from using this normal competitive activity is pro-competitor, not pro-competition. Additionally, competitors' market shares have grown, not declined, since Qwest's Winback Tariff was approved in 1999. Therefore, history has shown us that Qwest's Winback Tariff, and its efforts under that tariff, have not had a chilling effect on competition.

The Commission has now approved a positive recommendation on Qwest's compliance with the section 271(c)(2) competitive checklist which means that the local market is open to competition. Staff has confirmed that above average competition is occurring in Arizona[18] which reinforces the conclusion that the local market is open to competition. Since the market is open to competition, restricting Qwest from pursuing the same winback efforts that its competitors engage in would be unjustifiably discriminatory. It would seriously compromise Qwest's ability to compete and operate in Arizona.

CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Commission reject Staff's recommendation that Qwest refile its Winback Tariff to specify that Qwest will not attempt to utilize that tariff to win back a lost customer until a minimum of ninety (90) days from the date the customer left Qwest for another service provider as a condition of the Commission's

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[17] Reporters' Transcript of Proceedings, *In the Matter of U S West Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, Workshop 7 — 272, Public Interest, Track A, June 12, 2001 ("6/12/01 Tr."), at 196:25 to 197:11.

[18] Staff's Recommended Opinion and Order at ¶ 17.

recommendation that Qwest's application is consistent with the public interest in this section 271 proceeding.

RESPECTFULLY SUBMITTED this 15th day of September, 2003

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